No. 93-1151

In The

Supreme Court of the United States

October Term, 1993

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

NRA POLITICAL VICTORY FUND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

CHARLES J. COOPER*
MICHAEL A. CARVIN
ROBERT J. CYNKAR
WILLIAM L. MCGRATH

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that section 437c(a)(1) of the Federal Election Campaign Act violates the separation of powers by directing that the Secretary of the Senate and the Clerk of the House of Representatives (or their designees) shall serve as *ex officio*, nonvoting members of the Commission.

2. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that the Federal Election Campaign Act unconstitutionally interferes with the President's duty to "take Care that the Laws be faithfully executed" by vesting law enforcement authority in principal officers over whom the President has no removal authority.

3. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that section 437c(a)(1) of the Federal Election Campaign Act, which provides in part that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party," is an unconstitutional infringement upon the President's power under Article II, section 2, clause 2 of the Constitution to nominate principal officers who perform executive functions.

4. Whether the payments at issue in this enforcement action violate section 441b(a) of the Federal Election Campaign Act.

RULE 29.1

In accordance with Rule 29.1 of the Rules of this Court, respondents are the National Rifle Association – Institute for Legislative Action ("ILA"), the NRA Political Victory Fund ("PVF"), and Grant Willis, Treasurer of the PVF. ILA is a component of the National Rifle Association, Inc., and the PVF is a separate segregated fund organized under section 441b(2)(c) of the Federal Election Campaign Act. There are no other parent or subsidiary companies.

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STATEMENT OF THE CASE

Uniquely among the myriad executive and independent agencies and commissions created by Congress, the Federal Election Commission ("FEC" or "the Commission") counts among its membership two congressional agents – the Secretary of the Senate and the Clerk of the House of Representatives (or their designees). *See* 2 U.S.C. § 437c(a)(1).[1] Prior to the 1976 amendments to the Act, the Commission consisted of eight members: the six voting members were appointed – two each by the President *pro tempore* of the Senate, the Speaker of the House of Representatives, and the President – and the Secretary of the Senate and the Clerk of the House of Representatives were *ex officio* members without the right to vote.

[1] This provision is part of the Federal Election Campaign Act ("FECA" or "the Act"), 2 U.S.C. § 431 *et seq.*

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that these constitutive provisions violated the Appointments Clause[2] of the Constitution insofar as the Commissioners were charged with performing executive functions. *Id.* at 140-41. The separation of powers challenge in *Buckley*, however, was directed only at the four congressionally appointed, voting members of the Commission, so the Court did not address the constitutional status of the *ex officio* members.[3] Following *Buckley*, Congress reconstituted the FEC such that it was "composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1) (1976). Congress thus left intact the portion of the original statute placing two of its agents on the Commission.[4]

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[2] U.S. Const. art. II, § 2, cl. 2.

[3] Both the Court's opinion and the parties' briefs in *Buckley* make clear that the constitutional challenge to the FEC concerned only the six voting members. *See Buckley*, 424 U.S. at 127 ("Thus with respect to four of the six voting members of the Commission, neither the President, the head of any department, nor the Judiciary has any voice in their selection."); *see also* Brief of the Appellants at 193-210, *Buckley v. Valeo* (Nos. 75-436 and 75-437) (arguing that composition of FEC violates separation of powers without mentioning *ex officio* officers); Reply Brief of the Appellants at 85-111, *Buckley* (Nos. 75-436 and 75-437) (same).

[4] While this Court's holding in *Buckley* did not require Congress to reconsider its decision to place these *ex officio* members on the FEC, Congress was not unaware of their contested constitutional status. Testifying before a Senate subcommittee in the wake of *Buckley*, then-Assistant Attorney General for the Office of Legal Counsel Antonin Scalia noted the Ford Administration's view that the nonvoting, *ex officio* members ought not be restored to the reconstituted Commission:

> We believe that the spirit of the opinion, and even the letter of the Constitution, require this result. The connection of these two officers to the legislative branch is even closer than that of the present congressionally appointed members who have the right to vote. They are not only *appointed* by Congress, but *paid* by it and *removable* by it. We believe that the absence of voting power is not determinative for constitutional purposes. The power to be present and to participate in discussions is the power to influence.

In defending against an enforcement action brought by the FEC, respondents argued, *inter alia*, that the presence of these two congressional agents on the FEC violated the Constitution's separation of powers. The court of appeals agreed, holding that, notwithstanding their *ex officio*, nonvoting status, "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." App. 15a.[5] Because "Congress must limit the exercise of its influence . . . to its legislative role," App. 15a, the court held that the composition of the FEC violates the separation of powers and that the Commission thus "lacks authority to bring this enforcement action." App. 2a.

Respondents generally accept the Statement of the Case as set forth in the Petition, Pet. 3-11, with the exception (discussed in more detail below) that respondents dispute the Commission's conclusory assertion, Pet. 5, that respondents violated section 441b of the FECA.

REASONS FOR DENYING THE WRIT

The FEC raises two main arguments in support of its Petition: (1) that the court of appeals' decision misconstrues the separation of powers doctrine and, in any case, is sufficiently novel and significant to warrant review by this Court; and (2) that the court of appeals' refusal to validate the Commission's enforcement action against respondents under the *de facto* officer doctrine conflicts with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976).

The Court should deny the Petition. While it is true that the court of appeals' ruling is, in fact, "unprecedented," Pet. 19, so too was Congress' decision to place two of its agents in a nonvoting capacity on an executive agency. In addition to the fact that this arrangement is *sui generis*, the court of appeals' ruling that the FEC's composition violates the separation of powers is manifestly correct. The court also properly rejected the Commission's argument that the *de facto*

Federal Election Campaign Act Amendments: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. 119 (1976) (emphasis in original).

[5] "App. ___" refers to the Appendix to the Petition for a Writ of Certiorari. "Pet. ___" refers to the Petition itself.

officer doctrine prevents the court from providing respondent any remedy based upon the constitutional violation.

Moreover, the separation of powers violation found by the court of appeals does not exhaust the constitutional defects in the structure of the FEC. First, because the members of the Commission are principal (as opposed to inferior) government officers and are responsible under the statute for the performance of certain purely executive functions, they must be subject to the Chief Executive's supervision and control with respect to their executive functions. Yet under the FECA, the President has no removal authority over Commissioners, let alone the "at will" removal authority required by the Constitution for such officers. Second, section 437c(a)(1) of the Act, which provides in part that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party," is an unconstitutional infringement upon the President's power under Article II, section 2, clause 2 of the Constitution to nominate principal officers who perform executive functions. Finally, quite apart from the Commission's constitutional deficiencies, the payments at issue in this enforcement action simply do not constitute corporate campaign contributions in violation of section 441b(a) of the Federal Election Campaign Act. Should this Court grant the Petition for a Writ of Certiorari, respondents will argue that affirmance of the court of appeals' decision is supported by these alternative and independent grounds.

1. There are compelling practical reasons for denying the writ. As far as respondents have been able to determine, the FEC is the only executive or independent agency or commission whose membership by statute includes congressional agents. The FEC likewise has not pointed to any analogous federal entities whose constitutionality is called into question by the court of appeals' ruling. Moreover, as the FEC notes, it has voted, in obedience to the court of appeals' ruling, to reconstitute itself as a six-member agency without *ex officio* congressional representation, Pet. 10-11, and there is no indication that, so constituted, the Commission's fulfillment of its statutory responsibilities is in any manner impaired. That the FEC is *sui generis* and that it can fully perform its duties without the *ex officio* members weigh heavily against the certworthiness of the petition.

2. The court of appeals' decision in this case is manifestly correct. As set forth in the Petition, Pet. 8-10, the court of appeals reversed the district court's ruling that respondents lacked standing to raise this constitutional challenge, and held that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution."[6] App. 15a.

Congress' decision to place two of its agents on the FEC, even in a nonvoting capacity, is precisely the sort of encroachment upon executive power that the Constitution forbids.[7] In *Buckley*, this Court emphasized that certain functions statutorily assigned to the FEC are purely executive in nature. The Commission's civil law enforcement authority,

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[6] By deciding the constitutional issues before addressing respondents' statutory arguments, the court of appeals knowingly departed from the general rule that federal "courts should 'refrain from passing on the constitutionality of an act of Congress unless obliged to do so.' " App. 4a (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919))). The FEC does not challenge this aspect of the decision. Moreover, the court of appeals was surely correct in holding that this "prudential rule of avoiding constitutional questions," *Zobrest v. Catalina Foothills School Dist.*, ___ U.S. ___, 113 S. Ct. 2462, 2466 (1993), does not apply when, as in this case, "plaintiffs challenge[] the constitutional composition or character of a tribunal . . . . " App. 5a (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859 (1986), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56, 87 (1982)). A party defending an enforcement action brought by an entity purporting to be a government agency should not be required to defend and lose on a statutory ground before a court will consider the party's argument that the entity does not have the constitutional authority to administer or enforce the statute in the first instance.

[7] The FEC argues that "this Court has twice applied separation-of-powers analysis to federal commissions . . . with *ex officio* members from another branch, but has never found the inclusion of *ex officio* members relevant to the constitutional question." Pet. 16 (citing *Buckley*, 424 U.S. at 113, and *Mistretta v. United States*, 488 U.S. 361, 368 (1989)). However, as the court of appeals noted, "[a]lthough the Court [in *Buckley*] mentioned the *ex officio* members, it never discussed the constitutionality of their status." App. 5a-6a. The same is true of *Mistretta*, 488 U.S. at 368. The Commission's argument is accordingly without merit.

for example, is quintessentially and exclusively an executive function:

> The [FEC's] enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

Buckley, 424 U.S. at 138.[8]

Nor can there be any doubt that the presence of two congressional agents as members of the FEC permits Congress to influence the Commission's performance of its functions, including its executive functions. Common sense alone establishes that Congress intended its agents to influence the FEC's decisionmaking; as the court of appeals noted, "we cannot conceive why Congress would wish or expect its officials to serve as *ex officio* members if not to exercise *some* influence." App. 13a (emphasis in original). Indeed, the FEC itself acknowledges that "Congress . . . place[d] its agents in a position to try *to exert persuasive influence upon*, but not to

[8] In addition to these enforcement responsibilities, the Court held that each of "the Commission's broad administrative powers," including "rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself . . . represents the performance of a significant governmental duty exercised pursuant to a public law." *Buckley*, 424 U.S. at 140-41. "These administrative functions may . . . be exercised only by persons who are 'Officers of the United States.'" *Id.* at 141. At the same time, the Court held that the FEC also performs some non-executive tasks that are entirely consistent with the legislative function, and which may thus be performed by an FEC that includes congressional agents. *See id.* at 138. The instant enforcement action plainly implicates the FEC's executive duties.

bind or control, *the actions of executive decisionmakers*."[9] Pet. 19 (emphasis added).

Despite its admission that Congress' purpose in placing its agents on the FEC was to influence the agency in the performance of its executive functions, the Commission contends that the statutory provision naming congressional agents as *ex officio* members of the FEC "does not violate [the separation of powers] principle because the statute vests them with no authority to determine how the Commission exercises

[9] The FEC concedes that "congressional attempts to influence executive administrators can exceed lawful bounds," but argues that "the courts have required substantial proof of improper pressure on a decisionmaker and of prejudice in a particular case before relief will be provided." Pet. 19 n.11. This is a reference to the so-called "*Pillsbury*" doctrine, *see Pillsbury Co. v. FTC*, 354 F.2d 952, 964-65 (5th Cir. 1966), which "holds that the appearance of bias caused by congressional interference violates the due process rights of parties involved in *judicial* or *quasi-judicial* agency proceedings." *DCP Farms v. Yeutter*, 957 F.2d 1183, 1187 (5th Cir.), *cert. denied*, 113 S. Ct. 406 (1992) (emphasis in original); *see also D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972). While Congress' decision to place two of its employees on the Commission might well support a due process violation under the *Pillsbury* "appearance of bias" standard, respondents' separation of powers claim is altogether different.

A typical *Pillsbury* claim of unlawful congressional action necessarily focuses on specific congressional interference with a particular agency adjudication, and the lower courts have sensibly required that parties raising such a claim offer evidence that the challenged actions actually affected the agency's disposition. But where, as here, the constitutional claim is premised instead on allegations of *structural* defects in the agency, evidence of incident-specific impact is neither available nor necessary. *See, e.g., Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962) (allowing post-judgment collateral challenge to constitutional status of judges where "claim advanced by petitioners, that they were denied the protection of judges with tenure and compensation guaranteed by Article III, has nothing to do with the manner in which either of these judges conducted himself in these proceedings."). Accordingly, contrary to the FEC's position, respondent need not present evidence that the congressional members actually influenced the Commission's decisions in this matter.

any part of its executive powers." Pet. 13. According to the FEC, the absence of voting power in the *ex officio* members conclusively establishes the permissibility of their statutory membership on the Commission. Indeed, the Commission seeks to defend the arrangement by portraying the presence of the *ex officio* members as a salutary congressional effort to facilitate interbranch dialogue. *See, e.g.*, Pet. 12; App. 15a (the "Secretary and the Clerk play a mere 'informational or advisory role' in agency decisionmaking.").

But while this Court's separation of powers decisions have made clear that the Constitution forbids arrangements in which Congress seeks to exercise determinative or coercive authority over executive functions,[10] nothing in those decisions suggests that such coercive influence is a *sine qua non* of a constitutional violation. To the contrary, under this Court's cases, *any encroachment* by one branch into the realm of another – other than through the mechanisms (*e.g.*, the Presidential veto, Senatorial advice and consent) set forth in the Constitution itself – is presumptively impermissible:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, *as nearly as possible*, that each Branch of the government would confine itself to its assigned responsibility.

INS v. Chadha, 462 U.S. 919, 951 (1983) (emphasis added).[11]

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[10] *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (budget reduction authority granted to legislative officer); *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 111 S. Ct. 2298 (1991) ("*MWAA*") (Board of Review composed of members of Congress with veto power over decisions made by airport authority).

[11] While each branch is subject to the "hydraulic pressure . . . to exceed the outer limits of its power," *Chadha*, 462 U.S. at 951, this Court has also noted "the profound conviction of the Framers that the powers conferred on Congress were to be most carefully circumscribed." *Id.* at 947.

Nor can the FEC's logic be confined to itself. Congress would be no less justified in placing its agents – indeed, why not its members? – in offices throughout the Executive Branch. Surely Congress could better monitor and advise on developments at the Department of Justice if it required that one of its agents serve as a special assistant to the Attorney General.[12] Interbranch dialogue would no doubt be facilitated by the presence of congressional representatives at the President's Cabinet table. And what of the Judicial Branch? Congress has a legitimate role in monitoring the interpretation and application of federal law, and, in any case, it is responsible for authorizing and appropriating funds for the federal courts. Could Congress, in aid of these functions, require that one of its agents, nonvoting to be sure, sit in on this Court's deliberations?

These hypotheticals expose the fundamental flaw with the FEC's position: Congress' invasion of the Executive's domain by placing its agents on the FEC is not justified by any legitimate purpose. Surely the interbranch dialogue and information-gathering rationales advanced by the Commission are inadequate. As the court of appeals noted, "Congress enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through

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[12] This scenario highlights, perhaps even more starkly than the *ex officio* membership of the FEC, the lurking executive privilege issue to which such arrangements give rise. This privilege, which "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties," *United States v. Nixon*, 418 U.S. 683, 705 (1974), "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708. Simply put, an arrangement (like the composition of the FEC) that grants congressional officers automatic and unlimited access to all papers and conversations by executive decisionmakers necessarily and seriously threatens the executive branch's ability to "protect[] . . . the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* at 708. While the court of appeals did not rely upon this rationale, this incursion on executive privilege further supports that court's ruling.

direct oversight hearings, appropriation and authorization legislation, or direct communication with the Commission." App. 15a-16a (footnote omitted).[13]

Nor does it help the FEC's case to claim that nonvoting congressional representation on the Commission expedites or facilitates the achievement of these informational interests. As this Court has noted, "it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency." *Chadha*, 462 U.S. at 958-59. And in *MWAA*, the Court emphatically rejected a similar argument for pragmatism and flexibility in separation of powers analysis: "One might argue that the provision for a Board of Review is the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government.' " *MWAA*, 111 S. Ct. at 2312 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Despite the possibility that the congressional Board of Review "might prove to be innocuous," the *MWAA* Court instead saw in that arrangement "a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role," and so held that the statute violated the separation of powers. *Id.*

Precisely the same analysis applies to the statutorily mandated placement of congressional agents on federal agencies that perform executive functions. The Commission's only argument in support of the constitutionality of the *ex officio* nonvoting membership on the FEC is that the arrangement is "innocuous." The court of appeals, however, properly applied this Court's precedents in holding that the Constitution does not permit such congressional incursions into the executive

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[13] Indeed, the Act explicitly safeguards these congressional prerogatives. *See* 2 U.S.C. § 437c(b)(2) ("Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.")

sphere. Because the court of appeals' ruling is correct, this Court should deny the petition.[14]

3. When a federal court announces a new rule of federal law, the court's "opinion . . . 'is properly understood to have followed the normal rule of retroactive application' and must be 'read to hold . . . that its rule should apply retroactively to the litigants then before the Court.' " *Harper v. Virginia Dept. of Taxation*, ___ U.S. ___, 113 S. Ct. 2510, 2518 (1993) (quoting *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 2439, 2445 (1991)). Consistent with this "normal rule," the court of appeals properly declined the FEC's request that the court accord *de facto* validity to its enforcement action against respondents. The court of appeals held, rather, that it was "aware of no theory that would permit [it] to declare the Commission's structure unconstitutional without providing relief to [respondents] in this case."[15] App. 18a.

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[14] The Commission's attempt to find a split among the circuits on the issue presented in its Petition is unavailing. Pet. 18-19 (discussing *Ameron v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 485 U.S. 958 (1988), *cert. dismissed*, 488 U.S. 918 (1988), and *Lear Siegler, Inc., Energy Prod. Div. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988)). The cited cases, however, concern a provision of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, which imposes an automatic stay on the awarding of any federal contract upon receipt of a protest from a disappointed bidder so that the Comptroller General may investigate the award and to make a recommendation to the relevant agency. Despite the FEC's strained attempt to analogize those cases to the instant matter, they obviously say nothing at all about the constitutionality of congressional agents serving as *ex officio*, nonvoting members of an executive agency.

[15] The court of appeals might have cited in support of this proposition *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where this Court, having determined that Mr. Marbury had a "vested legal right" in his presidential commission to serve as a justice of the peace, asked the question: "If he has a right, and that right has been violated, do the laws of this country afford him a remedy?" *Id.* at 154. Noting that "[t]he government of the United States has been emphatically termed a government of laws, and not of men," *id.* at 163, the Court answered that "[i]t will

The Commission renews before this Court its extraordinary argument that, even if the FEC's statutory composition violates the separation of powers, the Commission's enforcement action against respondents, including the $40,000 fine imposed by the district court, should be deemed valid under the *de facto* officer doctrine. The FEC contends that the court of appeals' failure to do so conflicts with this Court's remedial disposition in *Buckley*. *See* 424 U.S. at 142. But as the court of appeals correctly noted, *Buckley* was an action for declaratory and injunctive relief that "could have purely prospective impact." App. 17a (citing *Buckley*, 424 U.S. at 9). There could thus be no claim that the plaintiffs in *Buckley* prevailed but were not granted a remedy; they got precisely the remedy they sought.

By contrast, this constitutional challenge arises in the context of a defense to an enforcement action.[16] Respondents' claim is simply that the FEC lacks constitutional authority to take the actions that it has against respondents. The FEC's answer is that the question of its constitutional authority is irrelevant, that it has authority to enforce a federal law against respondents despite the fact that it does not satisfy the

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certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* In light of *Marbury*, the Commission's acknowledgement that respondents have a legitimate "constitutional interest . . . in having the law enforced against them at the behest of an agency whose composition conforms to the Constitution," Pet. 24, would seem conclusively to establish the propriety of the court of appeals' remedial disposition.

[16] The FEC appears to argue that respondents could only raise this separation of powers claim pursuant to the Act's provision authorizing voters to bring a declaratory judgment action challenging its constitutionality. Pet. 23 n.14; *see* 2 U.S.C. § 437h. It suffices to note that the Commission does not offer any support for the bizarre notion that the express provision for a declaratory judgment action somehow extinguishes a party's ability to raise constitutional claims as a defense to an enforcement action brought by a government agency.

Constitution's requirements for holding such authority. Had the Appointments Clause challenge in *Buckley* arisen in the context of a defense to an enforcement action, this Court, according to the Commission, would have upheld the FEC's actions against Mr. Buckley and the other plaintiffs, including, for example, any fines imposed, notwithstanding the Court's determination that the Commission was unconstitutionally composed. The FEC is understandably unable to cite any case law supporting such a result.[17]

The implications of the FEC's argument extend well beyond the denial of a remedy to parties who successfully assert separation of powers challenges to government enforcement actions. If, as the Commission contends, the *de facto* officer doctrine prohibits a federal court from granting a remedy under those circumstances, then it necessarily follows that federal courts do not have jurisdiction even to entertain such constitutional defenses. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 505 (1975) (plaintiffs lack standing where alleged injury is not redressable by court); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (same). Indeed, the FEC was forthright before the court of appeals about this jurisdictional implication of its *de facto* officer argument, contending that respondents lacked standing to raise their constitutional defenses. *See* App. 17a n.6. The court of appeals, however, correctly rejected "an interpretation of the

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[17] This case does not present the question whether other parties currently defending enforcement actions brought by the FEC are entitled to the same relief as respondents. In support of its Motion for Expedited Consideration filed concurrently with the Petition, the Commission argued that the court of appeals' decision in this case has caused confusion in numerous other enforcement actions currently being prosecuted by petitioner in the federal courts. (This Court denied petitioner's Motion in an Order dated January 24, 1994.) While respondents are confident that the lower federal courts are capable of determining what effect (if any) the court of appeals' decision in this matter will have on other FEC enforcement actions, that issue is altogether separate from the issues raised in this case, and the existence of those parallel proceedings thus affords no basis for this Court to grant the Petition.

de facto officer doctrine that would likely make it impossible for [respondents] to bring their assumedly substantial constitutional claims and would render legal norms concerning appointment and eligibility to hold office unenforceable." *Id.* (quoting *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984)).

For the foregoing reasons, respondents respectfully submit that the appellate court's ruling does not warrant this Court's review. There are, however, at least three other adequate and independent legal grounds – two constitutional and one statutory – supporting the court of appeals' judgment. We will briefly discuss each ground in turn.

4. First, by vesting law enforcement authority in principal officers over whom the Executive has no removal authority, the Act unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed." Art. II, sec. 3. The court of appeals concluded that "there is not much vitality to the [removal] claim after *Morrison v. Olson*, 487 U.S. 654 (1988)." App. 11a (parallel citations omitted). The court also questioned the premise of the claim – that the President has no power of removal over FEC Commissioners – stating that it could "safely assume that the President would at a minimum have authority to discharge a Commissioner for good cause – if for no other." App. 12a.

To begin with the latter point, the Act itself is silent on the question of removal. *See* App. 12a. While it is true that "at will" presidential removal power may inhere in a power to appoint officers, *see, e.g., Shurtleff v. United States*, 189 U.S. 311, 316 (1903), such an interpretation here would obviously conflict with the Act's structure and legislative history confirming the intent of Congress to ensure the FEC's independence from presidential control.[18]

Nor is the removal issue resolved by assuming that the Act grants the President "good cause" removal power over

[18] *See, e.g.*, H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 8 (1974); 122 Cong. Rec. S3686, H2535, S6364 (1976) (statements of Sen. Clark, Rep. McHugh, and Sen. Cannon).

Commissioners. First, such an assumption would require the Court somehow to coax from the statute's *silence* on the issue not only a power to remove, but also particular limitations on that power – in essence, a removal "code." More importantly, such a limited presidential removal power over FEC Commissioners would not satisfy constitutional standards. Prior decisions of this Court upholding "good cause" limitations on the President's removal power over government appointees do not counsel otherwise. For example, the officers at issue in both *Humphrey's Executor v. United States*, 295 U.S. 602 (1935),[19] and *Wiener v. United States*, 357 U.S. 349 (1958), lacked the authority, which FEC Commissioners manifestly enjoy, to enforce a statute by seeking judicial imposition of a civil penalty – the power that gives rise to this instant case, and one that this Court has consistently recognized to be at the core of Executive Branch functions.[20] By contrast, this Court characterized the powers possessed by the FTC Commissioners in *Humphrey's Executor* and the members of the War Claims Commission in *Wiener* as "quasi-legislative" or "quasi-judicial."[21]

[19] *Humphrey's Executor* is further distinguishable, of course, in that the FTC statute at issue in that case expressly provided for presidential removal for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 619. There was thus no statutory silence to interpret.

[20] *See Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' "); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch . . . . "); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . . ").

[21] In *Humphrey's Executor*, the Court stated that the FTC "cannot in any proper sense be characterized as an arm or an eye of the executive," 295 U.S. at 628, and held that "[t]o the extent it exercises any executive function, as distinguished from executive power in the constitutional sense,

Similarly, the FECA is wholly lacking in the type of statutory protections of Executive Branch prerogatives that this Court in *Morrison* found essential to the validity of the "good cause" limitation on removal of an "independent counsel" appointed under the Ethics in Government Act of 1978. *Morrison v. Olson*, 487 U.S. 654 (1988). As the Court emphasized:

> No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment . . . is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so. . . . [I]n our view *these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.*

Id. at 696 (emphasis added). It is clear that the Executive Branch exercises no similar control over the Commissioners on the FEC. The *Morrison* Court also noted that the office of independent counsel was a "temporary" office, "appointed essentially to accomplish a single task." 487 U.S. at 672. In addition, the independent counsel had no "authority to formulate policy for the Government or the Executive Branch." *Id.* at 671. Again, the powers of the FEC stand in stark contrast,

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it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* The FTC plainly did not possess civil enforcement authority. The powers of the War Claims Commission were even farther removed from the executive realm, as that body was established solely to "adjudicate according to law" three narrow classes of claims against Japan. *Wiener*, 57 U.S. at 354.

for it is empowered to "administer, seek to obtain compliance with, and formulate policy with respect to" the federal election campaign laws, and it has "exclusive jurisdiction with respect to the civil enforcement of such [laws]." 2 U.S.C. 437c(b)(1). And while the independent counsel is an inferior officer "subject to removal by a higher Executive Branch official" (*i.e.*, the Attorney General), there is no such official to whom the Commissioners are " 'inferior' in rank and authority." *Morrison*, 487 U.S. at 671.

In sum, because the President has no power to remove FEC Commissioners, let alone the "at will" removal power constitutionally required for such officers, the FECA unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed."

5. Second, the FEC impermissibly limits the Executive's power under the Appointments Clause to nominate principal officers who perform executive functions. The Act provides in part that "[n]o more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party." 2 U.S.C. § 437c(a)(1). Article II, section 2, clause 2 of the Constitution, however, explicitly assigns to the President illimitable power to nominate principal officers of the United States. The court of appeals held that this Appointments Clause claim was nonjusticiable, reasoning that while such restrictions "may raise serious constitutional questions, . . . it is impossible to determine in this case whether the *statute* actually limited the President's appointment power." App. 8a. (emphasis in original) The court of appeals concluded that it could not determine whether the statute itself, or simply the President's perception of how the Senate intended to exercise its advice and consent prerogative, accounted for the Commission's perfectly bipartisan make-up.

But while the Senate's advice and consent role surely provides that body determinative influence over the ultimate composition of the FEC, the Constitution grants "[n]o role whatsoever . . . either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment." *Public Citizen v. U.S. Dept. of Justice*, 491

U.S. 440, 483 (1989) (Kennedy, J., concurring in the judgment).[22] And it is no answer to the Act's clear infringement of this principle to say that the President may have desired a bipartisan Commission absent the statutory requirement to that effect. The undeniable fact is that the President has complied with the law as enacted, thus raising more than an inference that the statute has had its desired effect. Moreover, the statutory requirement constitutes a *congressional* (*i.e.*, bicameral) limitation on the President's appointment power, while only the Senate is granted advice and consent authority; to equate the effect of the statute with the possible impact of the Senate's role is thus unjustified. This violation of the Appointments Clause provides an independent basis for the court of appeals' judgment.

6. Finally, the premise of the instant enforcement action – that the payment at issue violated section 441b(a) of the Act – is simply wrong. As set forth more fully in the Petition, *see* Pet. 5-6, the district court opinion, *sec* App. 20a-22a, and the court of appeals decision, *see* App. 2a-4a, this enforcement action is based on the FEC's allegation that the October 20, 1988, payment from the National Rifle Association – Institute for Legislative Action to the NRA Political Victory Fund ("PVF")[23] constituted an impermissible corporate campaign "contribution" in violation of section 441b(a), rather than, as respondents contend, a permissible reimbursement for expenses connected with PVF's direct solicitation of members. *See* 2 U.S.C. § 441b(b)(2)(C). The district court rejected

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[22] The exclusion of congressional influence from the nomination decision was unmistakably part of the Framers' design. *See, e.g.*, The Federalist No. 66, at 449 (A. Hamilton) (J. Cooke ed., 1961) ("It will be the office of the president to *nominate*, with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*: they can only ratify or reject the choice, of the president.") (emphasis added).

[23] PVF is a "separate segregated fund," or political action committee, organized and registered in accordance with the Act.

respondents' statutory arguments, and the court of appeals did not address them.

The statute plainly permits segregated funds such as PVF to solicit members with funds provided by a parent entity. *See* 2 U.S.C. § 441b(b)(2)(C). The district court's wholly unsubstantiated conclusion that "the motivation for making the payment does not render it lawful," App. 22a, frustrates this statutory exemption where, as here, the record shows that respondents intended to, and in fact did, act in compliance with the statute. Quite apart, therefore, from the FECA's constitutional infirmities, the court of appeals' decision is supported as well on the ground that respondents did not violate the statute.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

CHARLES J. COOPER*
MICHAEL A. CARVIN
ROBERT J. CYNKAR
WILLIAM L. MCGRATH

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

*Counsel of Record